

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

IN RE BLUE CROSS BLUE SHIELD ANTITRUST LITIGATION MDL 2406	: : Master File 2:13-cv-20000-RDP : : : : : This document relates to : Provider Track cases
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**RESPONSE OF BOIES SCHILLER FLEXNER LLP TO
MOTION TO DISQUALIFY CY SMITH**

Co-lead counsel for the Subscriber track Boies Schiller Flexner LLP (“BSF”) submits this response to the motion filed by the Provider Plaintiffs to disqualify Cy Smith and Zuckerman Spaeder LLP from representing any opt outs from the Provider Class. We make three simple points.

First, BSF has for many years represented an individual provider from Michigan named Anesthesia Associates of Ann Arbor, PLLC (“A4”) without anyone objecting that this was improper. That case was filed in the U.S. District Court for the Eastern District of Michigan on October 29, 2020. Case No. 2:23-cv-00461-RDP, Dkt. 1. The plaintiff A4 brought claims only against BCBS-Michigan, and those claims included both claims that were unrelated to those in the MDL as well as similar claims to those in the MDL; the former were dismissed, and the case was then transferred to this MDL on April 11, 2023. *See* Case No. 2:23-cv-00461-RDP, Dkt. 71. The BSF lawyer running that case has appeared in a hearing before this Court, with defendants and the Provider Class present, without any party objecting to BSF’s representation of A4 or raising any concerns regarding that representation, either during the conference or afterwards.

See Case No. 2:23-cv-00461-RDP (showing between docket entries 76 and 77 minute entry of Zoom status conference held on August 21, 2024) & Dkt. 78 (transcript of conference). The first time anyone suggested that BSF's representation of A4 could potentially be challenged was the filing by Provider Plaintiffs to disqualify Mr. Smith, which indirectly could be read to be making that suggestion.

Second, while no one has stated otherwise, we wish to make clear that there is no conflict created by BSF's representation of both A4 and the Subscriber Class. The antitrust allegations in the A4 complaint make clear that the alleged anticompetitive conduct by BCBS-Michigan has harmed both subscribers and providers like A4, with BCBS-Michigan as the beneficiary. For example, A4 alleges the following: "But for BCBSM's anticompetitive acts, Michigan consumers would have an increase in the quality and quantity of anesthesiology services available and a decrease in the quality-adjusted price of anesthesiology care, while anesthesiologists would benefit from competitive rates." Case No. 2:23-cv-00461-RDP, Dkt. 79 (Second Amended Complaint) at ¶ 133. There is therefore no basis for any ethical concern being raised by BSF's representation of A4.

Third, while no one has suggested otherwise, we also wish to make clear that there would be no basis for any suggestion that BSF has done anything inconsistent with its obligations under the Joint Prosecution Agreement ("JPA") referenced in the Provider Class motion. That agreement principally ensures that the common interest privileged will apply to communications between Providers and Subscribers, and that any confidential information shared among counsel for Providers and Subscribers shall be kept confidential. It also states: "Information obtained pursuant to this Agreement or information derived therefore shall be used for no purpose other

than preparation and prosecution of the Blue Cross Antitrust Cases.” BSF has not used any information obtained from the Provider Class under the JPA in its representation of A4.¹

CONCLUSION

For the foregoing reasons, we respectfully ask that the motion filed by Provider Plaintiffs should be resolved in a manner that makes clear that BSF may continue representing A4. If there is a hearing to address the motion, BSF would appreciate having the opportunity to be heard at that hearing.

Respectfully Submitted,

By: /s/ David Boies

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¹ It also is far from clear that A4 falls outside the definition of “the Blue Cross Antitrust Cases,” which the JPA defines merely by reference to “the above-referenced MDL.”